DATO' HAJI NIK MAHMUD BIN DAUD

v.

BANK ISLAM MALAYSIA BERHAD

HIGH COURT MALAYA, KOTA BHARU
DATO' HJ. IDRIS BIN YUSOFF J
[ORIGINATING MOTION NO: 25-26-1994]
27 SEPTEMBER 1995

***LAND LAW**: Plaintiff executing property purchase agreement and property sale agreement with the defendant - Plaintiff's attorney executing charge documents in favour of the defendant - Charge documents executed as security for loan granted under the Islamic banking concept of Al Bai Bithaman Ajil - Whether execution of documents tantamount to a colourable exercise to defeat the very purpose and intention of the Kelantan Malay Reservations Enactment 1930 and the National Land Code 1965 - Whether there was contravention of ss. 7 & 12 of the Malay Reservations Enactment - Consideration of s. 340 of the National Land Code 1965 - Whether charges in favour of the defendant indefeasible.*

On 6 May 1984 the plaintiff executed two agreements namely the "Property Purchase Agreement" and the "Property Sale Agreement" with the defendant. Under the first agreement there was a purchase by the defendant of certain properties owned by the plaintiff for a price of RM520,000. Under the second agreement the same properties were sold by the defendant to the plaintiff for a price of RM629,200. Both the agreements were signed contemporaneously and formed part of the transaction under which the defendant granted a loan under the Islamic banking concept of *Al Bai Bithaman Ajil*. On 8 May 1984 the plaintiff's attorney executed a charge of the said lands in favour of the defendant as securities for the loan.

The plaintiff sought an order that the charges be declared null and void and of no effect and that the memorandum of charge be cancelled. The plaintiff also sought an order that the property sale agreement and the property purchase agreement be declared null and void and of no effect and sought the return of his titles free of all encumbrances.

The plaintiff argued that the execution of the property purchase agreement contravened the provisions of ss. 7 & 12 of the Malay Reservations Enactment and urged the Court to declare that such dealing is null and void and argued that consequently, the creation of the charge by the plaintiff would be of no effect and ought to be set aside since its creation was dependant upon the said agreement.

Held:

[1] The concept of *Al Bai Bithaman Ajil* involves, as prerequisites, the purchase of the said property by the defendant from the plaintiff and the immediate resale of same to the plaintiff. When the property purchase agreement was signed the right that could be acquired under the agreement at that point of time was only a right to a registrable interest which right is yet to crystallise into a registrable interest. The acquisition of such right would confer on the defendant an *in personam* right against the plaintiff which would entitle the former to bring an action for specific performance in the event of the latter refusing to go along with the agreement.

[2] The provisions of the National Land Code clearly show that in terms of "dealing", registration plays a pivotal role for it is in fact registration that "vest" and "divests" title. It is upon registration that the title vests in the transferee and indeed it is only when the transferee becomes a registered proprietor that his title will have the indefeasibility which the National Land Code confers. In the present case there is no evidence to show that there was, at any time, a change in the registered proprietorship of the said lands pursuant to the execution of the property purchase agreement. The plaintiff was and is the registered proprietor of the said lands all along. As there was no transfer being effected and as the proprietorship still remains with the plaintiff, there was no dealing contrary to s. 7 of the Kelantan Malay Reservations Enactment 1930.

[3] The execution of the property purchase agreement and the property sale agreement constituted part of the process required by the Islamic banking procedure before a party can avail itself of the financial facilities provided by the defendant. That would account for the contemporaneous execution of the two agreements. In any event the property purchase agreement was rendered otiose and bereft of any consequential value the moment the property sale agreement was signed. That was what both parties had bargained for and they had agreed not to proceed beyond this. In the circumstances the execution of the property purchase agreement had not transgressed the provisions of ss. 7 & 12 of the Kelantan Malay Reservations Enactment 1930 since there was no dealing or attempt to deal in the said lands contrary to the provisions thereof.

[4] A scrutiny of the charge documents does not disclose any form of defect or illegality. The charge documents are registered in accordance with the procedure laid down in the National Land Code and such registration does not run counter to the Kelantan Malay Reservations Enactment. This is so by virtue of s. 9A and the inclusion of the defendant in Schedule D of the Enactment. Neither does the registration of the charge run counter to the Kelantan Land Enactment by virtue of s. 104(i) and also with the inclusion of the defendant in Schedule 26A of that Enactment.

[5] In the circumstances there was nothing in law and in fact that could deny the indefeasibility accorded by s. 340 of the National Land Code 1965 to the two charges registered by the plaintiff's attorney in favour of the defendant. As evidenced by the charge documents the defendant's right and interest therein only accrue as registered chargee and that is the extent of what the defendant claims.

[Plaintiff's motion dismissed with costs].

Cases referred to:

Tengku Mohamed Zairuddeen b. Tengku Mohamed Zaid v. Wazuraiyah bt Mohamad [1988] 1 MLJ 27 ***(dist)***
Haji Hamid b. Ariffin & Anor. v. Ahmad bin Mahmud [1976] 2 MLJ 79 ***(dist)***
Manang Lim Native Sdn. Bhd. v. Manang Selaman [1986] 1 MLJ 379 ***(dist)***
Hussanjan v. Haji Nik Yahya b. Nik Daud & Ors. [1973] 1 MLJ 9 ***(dist)***
Bachan Singh v. Mahinder Kaur & Ors. [1956] MLJ 97 ***(foll)***
Margaret Chua v. Ho Swee Kiew & Ors. [1961] MLJ 173 ***(refd)***
Macon Engineers Sdn. Bhd. v. Goh Hooi Yin [1976] 2 MLJ 53 ***(foll)***
Frazer v. Walker [1967] 1 AC 569 (AC) ***(refd)***
Wee Tiang Peck v. Teoh Poh Tin [1995] 1 MLJ 446 ***(con)***
Foo Say Lee v. Ooi Heng Wai [1969] 1 MLJ 47 ***(dist)***
Tan Hee Juan v. Teh Boon Keat [1934] MLJ 96 ***(refd)***
UMBC v. Syarikat Perumahan Luas Sdn. Bhd. (No. 2) [1988] 3 MLJ 352 ***(refd)***
M & J Frozen Food Sdn. Bhd. v. Siland Sdn. Bhd. & Anor. [1994] 1 MLJ 294 ***(refd)***
Phuman Singh v. Kho Kwang Choon [1965] 2 MLJ 189 ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 114, illustration (e)
Islamic Banking Act 1983
Kelantan Malay Reservations Enactment 1930, ss. 2, 3, 4, 7, 9A, 12, 14, 104(i)
Land Enactment 1938, Schedule 26A
National Land Code 1965, ss. 5, 205(1), 206(1)(b), 215(1), (2), 242, 340, (2)(b)

Other source referred to:

"Tenure and Land Dealings in the Malay States", David Wong, p. 164

For the plaintiff - M.S. Nayagam, M/s. Ahmad Rastom & Nayagam
For the defendant - Mohamed Ismail bin Mohamed Shariff, (K. Thavakumar with him), M/s. Mohamed Ismail & Co.

JUDGMENT

Idris Yusoff J:

By an originating motion dated 5 October 1994 the plaintiff applies to the Court for the following orders:

1. That the charges dated 8 May 1984 executed by the plaintiff's attorney in favour of the defendant in respect of 25 lots of land registered as PT 109 (HS(D) KB 645/83); PT 110 (HS(D) KB 646/83), and from PT 113

(HS(D) KB 649/83) to PT 135 (HS(D) KB 671/83); all in s. 12, Kota Bharu, Kelantan be declared null and void and of no effect and that the memorandum of charge registered under Charge No: Jilid 39, Folio 36, Bil Perserahan No: 1091/84 and Charge No: Jilid 39, Folio 37, Bil Perserahan No: 1092/84 with the Pengarah Tanah dan Galian, Kota Bharu, Kelantan be cancelled;

2. That the Property Sale Agreement and Property Purchase Agreement executed by the plaintiff and the defendant and dated 6 May 1984 be declared null and void and of no effect;

3. That consequent upon prayers (1) and (2) above, the defendant be ordered to return the plaintiff's titles, free of all encumbrances forthwith.

Attached to the application and in support thereof is an affidavit sworn by the plaintiff on 4 October 1994 setting out the relevant facts.

As can be gathered from the plaintiff's averments in the said affidavit and the exhibits annexed thereto the plaintiff on 6 May 1984 executed two agreements namely the "Property Purchase Agreement" and the "Property Sale Agreement" with the defendant. In respect of the former it shows that there was a purchase by the defendant of the properties listed in prayer (1) of the motion for a price of RM520,000. Having so purchased the defendant then resold to the plaintiff for a price of RM629,200 thereby making a profit of RM109,200. It is to be noted that both the agreements were signed contemporaneously.

On 8 May 1984 the plaintiff's attorney executed a charge of the said lands in favour of the defendant as securities for the loan of RM629,200, which loan was purportedly granted under the Islamic banking concept of Al Bai Bithaman Ajil.

It is also alleged by the plaintiff that the loan was never disbursed to him but as I see it on the strength of the Financing Facility Agreement dated 6 May 1984 executed by the plaintiff, Mariza Sdn. Bhd. and the defendant and in particular to clauses l(a) and 2(a) thereof, such an allegation can be brushed aside as having no basis at all. Clauses l(a) and 2(a) are set out below:

1(a) At the request of the first-named customer (the plaintiff) and the second named customer (Mariza Sdn. Bhd.) the bank (the defendant) hereby agrees to pay the purchase price payable by the bank to the first-named customer under the Property Purchase Agreement to the second-named customer and upon the terms and condition herein contained.

2(a) In consideration of the bank agreeing to pay the Purchase Price mentioned in clause 1(a) hereof to the second-named customer with the concurrence of the first-named customer, the second-named customer hereby covenants agrees and undertakes with the bank and the first-named customer that

the second-named customer shall in place of the first-named customer pay to the bank the purchase price payable by the first-named customer under the Property Sale Agreement (hereinafter called 'the purchase price') In the amounts, at the times and in the manner specified in s. 1 of the second schedule hereto or by instalments of such other amounts as shall be mutually agreed between the bank and the second-named customer.

As such and in the absence of any evidence to the contrary, it does not now lie in the plaintiff's mouth to deny the arrangements that have heretofore been agreed upon between the said parties, more so when the loan had already been disbursed to the "second-named customer".

The issues initially raised by the plaintiff to support his motion are:

Firstly, the defendant was at all material times prohibited from accepting charges in respect of usury transactions hence the acceptance of the charge by the defendant was *ultra vires* the defendant's articles of association; and

Second, that the execution of the Property Purchase Agreement, the Property Sale Agreement and the charge documents would clearly tantamount to a colourable exercise to defeat the very purpose and intention of the Kelantan Malay Reservations Enactment 1930 and the National Land Code 1965.

However, at the outset of the hearing the plaintiff abandoned the first issue and indicated that he would wish to go on with the second issue only i.e. on the alleged infringement of the terms of the Malay Reservations Enactment and the National Land Code.

It is common ground that:

(i) the plaintiff is a Malay as defined under s. 2 of the Kelantan Malay Reservations Enactment and also a native of Kelantan;

(ii) the defendant is a bank licensed under the Islamic Banking Act 1983 to carry on Islamic banking business, which, *inter alia* is to provide financing facilities under the concept of Al Bai Bithaman Ajil;

(iii) that the lands in question are lands declared under s. 4 of the Malay Reservations Enactment to be included in a Malay Reservation;

(iv) "Malay" as defined in s. 3 of the Malay Reservations Enactment means "a person belonging to any Malayan race who speaks any Malayan language and professes the Mohammedan religion, and shall include (a) the Maj1is Ugama Islam (b) the Official Administrator when acting as administrator or trustee of the estate of a deceased Malay";

(v) the defendant is neither a Malay nor a native of Kelantan;

(vi) the defendant is a party included in Schedule D to the Malay Reservations Enactment and also in Schedule 26A to the Land Enactment 1938;

(vii) A Power of Attorney was given by the plaintiff in favour of one Tengku Mahyiddin,

(viii) Charges in Form 16A were signed by Tengku Mahyiddin on behalf of the plaintiff in the exercise of the said power and the said charges were presented and registered on 8 May 1984.

It is strongly argued on behalf of the plaintiff that the execution of the Property Purchase Agreement had somewhat contravened the provisions of ss. 7 and 12 of the Malay Reservations Enactment and relying on the authorities of *Tengku Mohamed Zairuddeen b. Tenaku Mohamed Zaid v. Wazuraiyah bt Mohamad* [1988] I MLJ 27, *Haji Hamid b. Ariffin & Anor. v. Ahmad bin Mahmud* [1976] 2 MLJ 79, *Manang Lim Native Sdn. Bhd. v. Manang Selaman* [1986] 1 MLJ 379, *Hussanjan v. Haji Nik Yahya b. Nik Daud & Ors.* [1973] 1 MLJ 9, the Court is urged to declare that such dealing is null and void and consequently, the creation of the charge by the plaintiff would be of no effect and ought to be set aside since its creation was dependent upon the said agreement.

Counsel for the defendant in his submissions raises various issues to resist the motion - amongst others, he raises the issue of indefeasibility under s. 340 of the National Land Code, the interpretation of Kelantan Malay Reservations Enactment 1930 *vis-a-vis* Al Bai Bithaman Ajil transactions and the applicability of equitable principles to the facts of the case. For convenience, I shall deal with the question of interpretation of the Malay Reservations Enactment first.

The concept of Al Bai Bithaman Ajil involves, as prerequisites, the purchase of the said property by the defendant from the plaintiff and the immediate resale of same to the plaintiff. The question that requires to be determined, as a matter of obvious necessity, is the effect of such sale in the eyes of the law - such determination requires to be guided by the provisions of the Malay Reservations Enactment and the National Land Code.

Section 12(i) of the Malay Reservations Enactment says:

> All dealings or disposals whatsoever and all attempts to deal in or dispose of Reservation land contrary to the provisions of this Enactment shall be null and void.

and it appears to me that in the instant case dealings which are alleged to be "contrary to the provisions of this Enactment" refer to such dealings which are contrary to s. 7 of the Enactment. For easy reference, reproduced below is s. 7(i) which is pertinent to the issue under consideration:

> 7(i) No right or interest of any Malay in reservation land and no right or interest in such land acquired by virture of s. 13A by any person not being a Malay shall be transferred to or transmitted to or vest in any person not being a Malay provided that leases of reservation land shall be valid to the extent specified in sub-sections (ii) to (v) below, save as provided in this Enactment.

From the above it is manifestly clear that sub-section (i) prohibits any transfer or transmission or vesting of any right or interest of a Malay in reservation land to or in any person not being a Malay. In the circumstances what would be the effect of the Property Purchase Agreement in terms of s. 7(i) - does the said agreement per se confer on the defendant any registered title in the said lands? The crucial point is whether the execution of the Property Purchase Agreement comes within the context of "transfer" or " a vesting" of right or interest; on the present facts suffice it to say that the question of "transmission" is of no relevance.

To my mind when the Property Purchase Agreement was signed the right that could be acquired under the agreement at that point of time, since the agreement being still executory, was only a right to a registrable interest which right is yet to crystalise into a registrable interest. The acquisition of such right, however, would confer on the defendant an *in personam* right against the plaintiff which would entitle the former to bring an action for specific performance in the event of the latter refusing to go along with the agreement. And assuming that a decree of specific performance would be granted by the Court, such decree would be effective to achieve a statutory title only upon the appropriate instrument i.e. the instrument of transfer, being registered as required under National Land Code as otherwise the decree would remain inefficacious.

As was observed by Thomson J (as he then was) in *Bachan Singh v. Mahinder Kaur & Ors.* [1956] MLJ 97:

> To my mind, many of the difficulties which appear to arise in these cases would not arise if we were to bear in mind throughout the distinction between rights *ad rem* or personal rights and rights *in rem* or real rights. Where there is a valid binding contract for the sale of land, the purchaser, when he has performed his side of the contract, **acquires a right *ad rem* which is also a right *in personam***. In other words, he acquires a right to the land as against the vendor personally but not good against the world as a whole and, in due course, that right can become a real right good against the world as a whole **on registration** in accordance with the [FMS] Land Code. (emphasis added)

In *Margaret Chua v. Ho Swee Kiew & Ors*. [1961] MLJ 173 CA, Thomson CJ (as he then was) stressed that he saw no reason to depart from his observations above stated.

The observations of Thomson J (as he then was) in *Bachan Singh* found favour with the Federal Court in *Macon Engineers Sdn. Bhd. v. Goh Hooi Yin* [1976] 2 MLJ 53 where Gill CJ (Malaya) said a page 54:

> It would seem clear that the respondent cannot claim title to or any registrable interest in the property in question merely on the strength of the sale agreement which is a non-statutory and non-registrable instrument ...

and at page 56 Ali FJ said:

> A purchaser of land under an agreement cannot obviously have any registrable interest in land. But he has a right to the land or interest in land against the vendor personally which according to Thomson J (as he then was) in *Bachan Singh v. Mahinder Kaur* is not good against the world as a whole.

Raja Azlan Shah, FJ (as he then was) expressed his agreement when he said at page 57:

> In my view, the respondent had a contractual right under a contract of dealing in land which is a right of action against the vendor personally.

It is submitted by Counsel for the defendant that in order to constitute a transfer of a right or interest in land within the meaning of s. 7 of the Malay Reservations Enactment, such transfer must be effected by a validly registered instrument e.g. Form 14A. This, as further submitted, is in accord with s. 14 of the Malay Reservations Enactment which says:

> Except as otherwise in this Enactment provided the provisions of the Land Enactment in force in the State of Kelantan and all Rules made thereunder shall apply to Reservation land.

As provided in s. 5 of the National Land Code "dealing" means:

> any transaction with respect to alienated land effected under the powers ... conferred by Division IV, and any like transaction effected under the provisions of any previous land law, but include any caveat or order.

while s. 205(1) says:

> The dealings capable of being effected under this Act with respect to alienated lands and interests therein shall be those specified in parts fourteen to seventeen, and no others.

Part fourteen refers to transfers, part fifteen to leases and tenancies, part sixteen to charges and liens while part seventeen to easements. Further s. 206(l)(b) categorically states:

> no instrument effecting any such dealing shall operate to transfer the title to any alienated land or, as the case may be, to create, transfer or otherwise effect any interest therein, **until it has been registered under part eighteen**. (emphasis added)

while sub-section (1) of s. 215 says:

> The transfer under this Act of any alienated land shall be effected by an instrument in Form 14A.

and again sub-section (2) of the said section, and this is stressed, states:

> The title of the transferor shall pass to and vest in the transferee upon the registration of any such transfer, together also with the benefit of any registered interests then enjoyed with the land.

The above provisions doubtlessly show that in terms of "dealing", registration plays a pivotal role for it is in fact registration that "vests" and "divest" title. See *Frazer v. Walker* [1967] 1 AC 569 (AC). David Wong in "*Tenure and Land Dealings in the Malay States*" says at page 164:

> The transfer of land or an undivided share in land is by way of registration. Upon a transfer of land being duly effected, the title of the transferor passes to and vests in the transferee ... When land or and undivided share in land is transferred, it means the substitution of the transferee for the transferor as the new proprietor or co-proprietor who now holds the land from the state subject to the same terms of land holding.

In fact it is invariably the practice that in the sale and purchase agreement it is provided that on the date of completion, the purchaser would be given by the vendor the transfer form together with the document of title and there only remains for the purchaser to effect the registration of the said instrument of transfer. It is upon registration that the title vests in the transferee and indeed it is only when the transferee becomes the registered proprietor that his title will have the indefeasibility which the National Land Code confers. I must say that in this case there is no evidence to show that there was, at any time, a change in the registered proprietorship of the said lands pursuant to the execution of the Property Purchase Agreement. All along the plaintiff was and is the registered proprietor of the said lands. That being the case I hold that there was no transfer being effected and the proprietorship still remains with the plaintiff. And I would add that neither was there any vesting of right or interest in the defendant of the said lands. To this end I would reiterate what I said in *Wee Tiang Peck v. Teoh Poh Tin* [1995] 1 MLJ 446 at page 455 that "'vesting', as appears in s. 7(i), is intended to cover cases where right or interest is indefeasibly vested in a person to form part of his property, thereby enabling him to deal with and alienate such right and interest as his own ..." The facts of this case, with respect, do not seem to come within the aforesaid ruling.

Having held that there was no dealing contrary to s. 7, the next question that has to be addressed to is whether the execution of the Property Purchase Agreement or the Property Sale Agreement is in purport and effect an attempt

to deal in reservation lands contrary to the provisions of s. 12 of the Malay Reservations Enactment.

It is the defendant's contention that the circumstances of the instant case are such that they could not even be said to amount to an attempt to deal in reservation lands.

Judicial decisions have shown that intention is an essential element in construing "attempt". A party's conducts or acts may sometimes have gone to a certain extent that could amount to attempt - but on the contrary there may be cases where the circumstances would show that their conducts or acts have fallen very much short of attempt. It is settled law that quite apart from the element of intention, to constitute attempt, the act done must have reached a reasonably advanced stage but for some interruptions falls short of achieving the result. A useful guidance is perhaps by analogy of criminal law wherein it is described as "the acts that would be sufficient to constitute attempt must be proximate enough to the commission of the crime".

On a fair reading of the Malay Reservations Enactment one cannot help but conclude that the intention of the legislature in the promulgation of the Enactment is "to preclude Malays from parting with their rights and interests in reservation lands ...". And to ensure achieving this very intention certain forms of statutory prohibition have been incorporated in the Enactment in the form of s. 7 with the consequences being highlighted in s. 12 should there be any infringement thereof.

The case of *Foo Say Lee v. Ooi Heng Wai* [1969] 1 MLJ 47 and the four cases relied upon by the plaintiff can be distinguished on facts. In all these cases, the Court was asked to give effect to what have been allegedly agreed to by the parties which would consequently involve the transfer of proprietorship. Unlike in the instant case it was never the intention of the parties, in as much as it can ever be said to be within their contemplation, to involve any transfer of proprietorship. It so happened that the execution of the Property Purchase Agreement and the Property Sale Agreement constituted part of the process required by the Islamic banking procedure before a party can avail itself of the financial facilities provided by the defendant. Hence that would account for the contemporaneous execution of the two agreements; and in fact, it would be observed that the Property Purchase Agreement would be rendered otiose and bereft of any consequential value the moment the Property Sale Agreement was signed. For my part, I would say that that was what both parties had bargained for and they too had agreed that beyond this, to proceed no more. These prerequisites had been well understood by the plaintiff.

Accordingly, it is my judgment that the execution of the Property Purchase Agreement had not transgressed the provisions of s. 7 and 12 of the Malay

Reservation Enactment since there was no dealing or attempt to deal in the said lands contrary to the provisions thereof.

Now to turn to the issue of indefeasibility under s. 340 of the National Land Code. The section reads:

> (l) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.
>
> (2) The title or interest of any such person or body shall not be indefeasible
>
> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
>
> (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or
>
> (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.
>
> (3) Where the title or interest of any person or body is defeasible by reason of any circumstances specified in sub-section (2):
>
> (a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and
>
> (b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:
>
> Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.
>
> (4) Nothing in this section shall prejudice or prevent:
>
> (a) the exercise in respect of any land or interest of any power of forfeiture or sale conferred by this Act or any other written law for the time being in force, or any power of avoidance conferred by any such law, or
>
> (b) the determination of any title or interest by operation of law.

It is submittted by Counsel for the defendant that in the light of the above section it is incumbent upon the plaintiff to show which limb of the exceptions to indefeasibility applies before he can seek to impugn the validity of both the charges. Besides, as further submitted by him, the plaintiff has also to show due compliance with the set criteria as stipulated in that section.

In his submissions in reply Counsel for the plaintiff seems to allege that the registration of the charges was obtained by means of "insufficient or void instrument", which is contrary to s. 340(2)(b), hence the interest of the defendant as chargee is not indefeasible. Quite apart from that, Counsel also seems to rely on paragraph (c) of the said sub-section though I am inclined to say, with respect, that that paragraph has no bearing on the instant case as there does not seem to be present any element of unlawful acquisition of title or interest "by the person or body in the purported exercise of any power or authority conferred by any written law". On the premise I hold that in this case, indefeasibility can only be successfully attacked by evidence which manifests that registration was obtained by "means of an insufficient or void instrument". This means that a party can successfully seek the aid of s. 340(2)(b) if it can be shown that there exists a defect or illegality in the execution of the charge documents e.g. if it can be shown that the signature of the chargor is not that of the registered proprietor of the lands or someone authorised by him or that the signature was not properly obtained in that there is present an element of forgery or duress.

There are, however, instances whereby despite registration, the title or interest of any person or body in the land either as proprietor, chargee, lessee or owner of dominant land had been held to be not indefeasible.

Such instances are where dealings are effected in favour of or by minors - *Tan Hee Juan v. Teh Boon Keat* [1934] MLJ 96; or where dealings are in contravention of any restriction in interest to which the land is subjected to - *UMBC v. Syarikat Perumahan Luas Sdn. Bhd.* (No. 2) [988] 3 MLJ 352; or where dealings are not in compliance with the National Land Code - *M & J Frozen Food Sdn. Bhd. v. Siland Sdn. Bhd. & Anor.* [1994] 1 MLJ 294; or where the charge is purported to be a security for the loan made in contravention of the Moneylenders Act 1951 - *Phuman Singh v. Kho Kwang Choon* [1965] 2 MLJ 189. In this respect Counsel for the defendant submits that none of the above instances can be relied upon by the plaintiff. The instruments of charge are in the proper Form 16A as prescribed by the National Land Code - see s. 242 - and are properly executed by the plaintiff. There is no question of incapacity on the plaintiff's or his attorney's part.

A scrutiny of the charge documents does not disclose any form of defect or illegality. The charge documents are registered in accordance with the procedure laid down in the National Land Code and such registration does not run counter to the Malay Reservations Enactment either, and this is so by virtue of s. 9A and with the inclusion of the defendant in Schedule D, nor the Kelantan Land Enactment by virtue of s. 104(i) and also with the inclusion of the defendant in Schedule 26A. (Section 104 is one of the sections in the Kelantan Land Enactment that has been saved upon the coming into force of the National Land Code 1965).

Counsel for the plaintiff has also made a rather fleeting comment on the failure to register the Power of Attorney with the Pengarah Tanah & Galian (Director of Lands and Mines) since registration of the charges was carried out by him as the said lands were being held under registry titles. Be that as it may I do not think that such a failure would give rise to any legal impediment to the registration process in view of some directory measures that have to be taken pursuant to Chapters 1 and 2 of Part Eighteen of the National Land Code. And coupled with the presumption of existence of certain facts as illustrated in paragraph (e) of s. 114 of the Evidence Act i.e. that judicial and official acts have been regularly performed, I see no reason, on the facts, to question the validity of the registration. Moreover if the plaintiff is mindful of pursuing this issue, he should have joined in as a party, the Pengarah Tanah dan Galian - but he had not!

In view of the foregoing I am satisfied that there is nothing in law and in fact that could deny the indefeasibility accorded by s. 340 of the National Land Code to the two charges registered on 8 May 1984 by the plaintiff's attorney in favour of the defendant. As evidenced by the charge documents the defendant's right and interest therein only accrue as registered chargee and that is the extent of what the defendant claims.

The final issue raised by Counsel for the defendant is the applicability of equitable principles to the facts of the instant case. Counsel says that:

In interpreting and analysing the documents before Your Lordship, equity requires Your Lorship to look into the true intention of the parties as envisaged therein ...

I wish to say that the question of intention of both parties in signing the Property Purchase Agreement has already been discussed in the earlier part of this judgment which I consider is sufficient to cover the issue raised by Counsel. I do not wish to add anything further to it.

In the result I dismiss the motion with costs.